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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 235

SIDNEY BLAU and SIDNEY FISHER,

Defendants and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE THEREOF,

Appellees.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Three.

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THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE THEREOF,

Appellees.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Petitioners, Sidney Blau and Sidney Fisher, pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division Three thereof, entered on March 23, 1956, and modified on March 27, 1956, and further modified on March 28, 1956 [Certified Record, Vol. IV—Petition for Hearing in the Supreme Court, pp. 1-2; Appendix, pp. 1, 31, 32, Crim. No. 5371]

whereby the judgments of conviction and orders denying motion for a new trial by the Superior Court of the State of California, in and for the County of Los Angeles, were affirmed.

Opinions Below.

The opinion of the Court below, District Court of Appeal of the State of California, in and for the Second Appellate District, Division Three, affirming the judgments of conviction and orders of the Superior Court of the State of California, in and for the County of Los Angeles, denying a new trial [Certified Record, Vol. IV—Petition for Hearing in the Supreme Court, pp. 1-2; Appendix, pp. 1-32, Crim. No. 5371]. The Opinion is reported in 140 Advance California Appellate Reports 202, 294 P. 2d 1047.

A petition for rehearing in the District Court of Appeal on the appeal sustaining the judgments of conviction of your petitioners, and the orders denying the petitioners' motion for a new trial [Certified Record, Vol. IV—Appellants' Petition for Rehearing, Crim. No. 5371], was denied on April 5, 1956; a petition for hearing in the Supreme Court of the State of California from the judgments of conviction and the orders denying a motion for a new trial [Certified Record, Vol. IV—Petition for Hearing in the Supreme Court, Crim. No. 5371] was denied by said Supreme Court, April 18, 1956 [46 A. C. Minutes, p. 2].

A petition to withhold remittitur was granted by the District Court of Appeal of the State of California, Second Appellate District, Division Three, whereby the issuance of the remittitur was ordered stayed until June 29, 1956.

Jurisdiction.

The judgment of the District Court of Appeal was entered March 23, 1956, modified on March 27, 1956, and further modified on March 28, 1956 [Certified Record, Vol. IV, Petition for Hearing in the Supreme Court, pp. 1-2; Appendix, pp. 1, 31, 32, Crim. No. 5371].

A petition for rehearing in the District Court of Appeal was denied April 5, 1956 [Certified Record, Vol. IV].

A petition for hearing in the Supreme Court of California was denied April 18, 1956 [Certified Record, Vol. IV]. 46 A. C. Minutes, p. 2.

The constitutional issues here presented were urged in the lower Court. The jurisdiction of this Court is invoked under Section 1257(3) of the Judicial Code, as amended.

Questions Presented.

The verdict convicted the petitioners in Count I of conspiracy to commit petit theft and violate Section 3020(b) of the California Corporations Code [Certified Record, Vol. I, Clk. Tr. pp. 43-44].

The District Court of Appeal in its opinion held that the evidence was insufficient to establish conspiracy to violate Section 3020(b) of the California Corporations Code [Certified Record, Vol. IV, Petition for Hearing in Supreme Court, Appendix, pp. 21-23, 32]; but did not reverse the conviction of Count I insofar as it related to conspiracy to violate Section 3020(b) of the California Corporations Code [Certified Record, Vol. IV, Petition for Hearing in Supreme Court, Appendix, p. 32].

The punishment for conspiracy to violate Section 3020(b) of the California Corporations Code is imprisonment in a state prison for not less than three nor more than ten years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding $500.00, or by both such fine and imprisonment, according to Section 3020(b) of the California Corporations Code and Section 182 of the California Penal Code.

The punishment for conspiracy to commit petit theft is imprisonment in the county jail for not more than one year or in a state prison for not less than six months or not more than three years, or by a fine not exceeding $5,000.00, or both, according to Sections 182 and 18(a) of the California Penal Code.

The petitioners were sentenced to State Prison for the term prescribed by law to run concurrently with sentences of imprisonment in the County Jail for 6 months on Counts 2 and 3 (peti theft) [Certified Record, Vol. I, Clk. Tr. pp. 222-225].

The trial court admitted prejudicial evidence concerning an unrelated subject of meat rationing resulting in a miscarriage of justice.

The trial court admitted evidence of telephone conversations unlawfully or illegally obtained.

The petitioners contend they were twice put in jeopardy and that no proper ruling was made on their plea of jeopardy.

The jury was guilty of misconduct in deciding the case by compromise.

The trial court admitted evidence with reference to the acts and declarations of co-conspirators made out of the presence of the accused.

The trial court admitted evidence of acts which were not shown to have been done in furtherance of the common objective and design for which the defendants allegedly combined.

The assignment of the case for trial was not in the usual procedure.

The questions presented are:

(1) Whether the conviction of Count I, to wit, conspiracy, should be reversed insofar as Section 3020(b) of the California Corporations Code is concerned, so that it may be determined whether the imprisonment is to be for a period of 6 months to 3 years, or for a period of 3 years to 10 years, so as not to inflict cruel and inhuman punishment.

(2) Whether there was a denial of due process of law in admitting prejudicial evidence concerning an unrelated subject of meat rationing, which occurred years before the charges contained in the information.

(3) Whether there was denial of due process of law in admitting evidence of telephone conversations unlawfully or illegally obtained.

(4) Whether the petitioners were twice put in jeopardy for the same offense in violation of the Fifth Amendment to the United States Constitution.

(5) Whether there was a denial of due process of law by the jury arriving at a verdict by compromise.

(6) Whether there was a denial of due process of law by the trial court admitting evidence with reference to the acts and declarations of co-conspirators made out of the presence of the accused.

(7) Whether there was a denial of due process of law by the trial court admitting evidence of acts not done in furtherance of the common objective for which the defendants allegedly combined.

(8) Whether there was a denial of due process of law in the assignment of the case for trial contrary to the usual procedure prevailing in the court.

(9) Whether the defendants and petitioners were denied due process of law by reason of the failure of the court to give an instruction involving the two reasonable theories rule of law, a rule subsequently approved by the Supreme Court of California in *People v. Merkouris,* 46 A. C. 547, 566.

Statutes Involved.

(1) Section 3020(b) of the California Corporations Code provides:

> "Every director, officer, agent, or shareholder of any corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the corporation, or makes or concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation is guilty of a public offense."

Section 3020 further provides, insofar as it is here material:

> "Each public offense specified in this section is punishable by imprisonment in a state prison not less than three nor more than 10 years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding five hundred ($500), or by both such fine and imprisonment."

(2) Section 182 of the California Penal Code provides, insofar as it is here material, that conspiracies are punishable as follows:

> "When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony,"

and further provides:

> "When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both."

(3) Section 18(a) of the California Penal Code provides:

> "Except in cases where a different minimum punishment is prescribed by any law of this state, for every offense declared to be a felony and punishable by imprisonment in the state prison, the minimum imprisonment shall be imprisonment in any of the state prisons for not less than six months."

Summary Statement of Matters Involved.

The petitioners, Sidney Blau and Sidney Fisher, by Information filed by the District Attorney of Los Angeles County, State of California, were charged in Count One with violation of Section 182, Subdivisions 1 and 4, of the Penal Code (conspiracy) in that they are alleged to have conspired that they would commit theft in violation of Section 484 of the Penal Code, and falsify corporate records in violation of Section 3020, Subdivision (b) of the Corporations Code of the State of Califorina, and in Counts Two and Three the crime of grand theft.

Blau and Fisher were jointly charged with Joseph Mays and Mike Meceirow, and the trial of the action was submitted on the transcript of the preliminary hearing after trial by jury was duly waived. That thereafter, without a decision being rendered by the Court, the matter was transferred to another Department of the Superior Court before the Honorable Walter Evans, judge presiding therein, and a jury trial proceeded. Mike Meceirow was acquitted, and the jury was unable to agree on the other three defendants.

Thereafter the case was assigned to still another department of the Superior Court, the Honorable Arthur Crum, judge presiding, and after a trial by jury the defendant Mays was acquitted, and Blau and Fisher were convicted of Count One of the crime of conspiracy to commit petty theft and to violate Section 3020(b) of the Corportions Code and on Counts Two and Three of the crime of petty theft.

A motion for a new trial was made and denied on February 16, 1955. Defendants were sentenced to prison on Count One (conspiracy), and to the County Jail for six months on Counts Two and Three, all of said sentences to run concurrently.

Thereafter the District Court of Appeal of the State of California in and for the Second Appellate District, Division Three, affirmed the judgments of conviction and orders of the Superior Court denying a new trial. A petition for rehearing and a petition for hearing in the Supreme Court were denied.

The petitioners contend that the Court failed to determine a plea of once in jeopardy interposed by the petitioners on the basis that the prosecution and the defendants waived trial by jury and had submitted the case

on the transcript to a Judge of the Superior Court of the State of California in and for the County of Los Angeles, sitting without a jury, for the purpose of determining the issues and conducting a trial. That thereafter the matter was transferred from the Court to whom the matter had already been submitted for trial upon the transcript, back to the Master Calendar Department, and the matter was then assigned to a new trial court before Judge Walter R. Evans, where a trial was held and resulted in a mistrial [Certified Record, Vol. I, 2d Supp. Clk. Tr. pp. 2-6; Supp. Clk. Tr. pp. 5-6; Vol. IV, Rep. Tr. pp. 1691L—1691N; Vol. I, Clk. Tr. p. 14].

That petitioners further contend that the Court committed prejudicial error in handling this case in a manner other than the usual and ordinary procedure for the transfer and trial of criminal cases. That an affidavit of Russell E. Parsons was filed setting forth the particulars, showing the departure from the usual and ordinary procedure followed in such cases. That the defendants made timely objection to the unusual handling of the case [Certified Record, Vol. IV, Rep. Supp. Tr. pp. 21-30; Vol. I, Supp. Clk. Tr. pp. 10-15].

The petitioners further contend that the court erred in refusing to give the two reasonable theories instruction proffered by the defendants and appellants, this being a case which involved a substantial amount of circumstantial evidence, and the Supreme Court of California, subsequent to the affirmation of the conviction herein, reversed a murder case where the trial court had failed to give the "two reasonable theories" instruction.

See:

People v. Merkouris, 46 A. C. 547, 566.

That the evidence may be briefly summarized as follows: Blau was the operator of a cooperage business known as the American Drum Company, which concern operated in Los Angeles where it maintained a plant, and steel drums were purchased and sold to the trade, and a considerable business was done in the repairing, reconditioning and servicing of drums for various concerns. The drums would be brought in from various establishments in and about Los Angeles to the defendant Blau's plant, and there they would be serviced and reconditioned and returned to the owners, for a fee. Large amounts of drums were dealt in. A great many drums were purchased, some from large dealers who no longer had use for the drums, and in many instances from peddlers who dropped into the plant and sold drums.

The defendant Fisher was a partner of Blau in a restaurant known as the Courthouse Cafe, situated at Temple and Broadway, Los Angeles, which establishment Blau had operated for many years, catering to people in the Hall of Justice, Hall of Records, State Building, and the numerous city, county and state offices. Fisher for a time gave up working at the Courthouse Cafe to go to work for Blau in the American Drum Company plant, with the understanding he would receive a salary and an interest in the business.

Mays and Meceirow (who were acquitted) were driver-salesmen for American Drum Company, and would call upon the trade, soliciting the sale and servicing of drums. They would pick up drums, take them to the American Drum Company plant, and would return the drums after they were serviced, and in many instances they purchased extra drums which were available for sale at the various plants. A number of men who were shipping and receiv-

ing clerks at various plants in and about Los Angeles testified that upon occasions they had been approached by either Mays or Meceirow with the suggestions that if they wished to pick up some money it could be done by handling the drums in a manner so that deliveries were either shorted or over. For example, if 50 drums were sent to be serviced and repaired, the record might show 60, or, if 50 drums were delivered, the records of receipt might show 40.

There was one of the alleged co-conspirators who testified that he had talked with Blau and Fisher and that false invoices were made out to his company covering drums that were never delivered or received.

Some of the co-conspirators testified that they had talked with Blau or Fisher and that upon occasions they had borrowed money from Mr. Blau.

All of these receiving and shipping clerks were accomplices and named as co-conspirators. None of them, however, was charged by information, indictment or otherwise, with any public offense. All admitted that this was a fact; that they had not been prosecuted. In each instance their confessed peculations from their employers were under $200.00, and the statute of limitations on petty theft had run, and no complaint had ever been filed against them charging any public offense whatsoever.

A competitor of the American Drum Company, the head of the Levine Cooperage Company, one of the largest concerns of its kind in the country, testified that he had employed Clyde Duber & Associates, a private detective concern in Los Angeles, to make some investigation about shortages at his plant; that he paid Duber several thousand Dollars for this work, and Duber, together with some of his private detectives, followed

various trucks from various plants to, and in, and out of the American Drum Plant. They would count various drums on the trucks as they went in and out of the various plants, and in and out of the American Drum Company plant, making a quick count by rows and numbers. In some instances, but not all, they were able to identify a truck driver, being either Mays or Meceirow, who were acquitted, or another truck driver. (None of this tended to corroborate in any respect the connection of either Blau or Fisher with these transactions if they were unlawful in any respect.) (It should be remembered that Levine admitted he employed a former executive in the District Attorney's office to advise in connection with the institution of this prosecution, and paid this attorney a substantial fee.)

Various documents were offered in evidence, such as numerous invoices and delivery slips, which were in part identified by the receiving and shipping clerks. That no evidence was submitted showing that any of the companies involved in the action were corporations at or during the time set forth in the information charging the offenses named. One witness, a man by the name of Lou Tannes, who had worked for the Levine Cooperage for almost 20 years and had worked for American Drum, and after the arrest of Blau and Fisher had acquired, together with an attorney who refused to disclose who his principal was who furnished the money for the purchase, the assets of the American Drum. Tannes, Mays, Meceirow and other employees of American Drum received bonuses on Christmas during their employment by American Drum.

A handwriting and typewriter expert testified that some of the invoices identified by one of the accomplices as being false, were written upon a typewriter, in part or

in their entirety, which typewriter had been found in the home of your petitioner Fisher. The accomplice testified that the typing was done at the home of Fisher or Blau. This typewriter was found months after the dates of the invoices and months after the business had been sold by Blau to Tannes, a former employee of the witness Levine who instituted the proceedings. The evidence showed that the typewriter found in Fisher's house had been used at the office of the American Drum Company while it was actually in business, and had only been taken to Fisher's home after the business had been closed and disposed of.

Fisher and Blau both took the witness stand; Fisher testifying that for years he had been interested in the restaurant business and that he had worked for some time at the Courthouse Cafe at Temple and Broadway, Los Angeles, and that at the request of Blau he had gone to work at the American Drum plant; that his duties were numerous; that he kept production going throughout the plant; that he purchased many drums from peddlers as they came to the plant; that he would ship out loads, take orders, and did numerous things in and about the plant. He denied that he had any knowledge of any shortages or overages on either deliveries or receipt of drums from any of the plants concerned, or that he had any guilty knowledge of any irregularities in the sale or receipt of drums. He denied ever having any improper transactions with any of the receiving clerks named as accomplices and co-conspirators.

Blau testified that for years he had been in the restaurant business; in fact, since 1946, at Temple and Broadway, Los Angeles, and that he had gone into the cooperage business, set up the American Drum, and that he

had conducted the business for some time; that he was in competition with Levine and the Levine Cooperage Company. That he had loaned some of the receiving clerks money; that he did it to keep on friendly relations with them; that he had not knowingly ever bought or received drums under any improper circumstances; that he had never made any arrangements with any of these men for overages or shortages and for improper charges to their companies.

During the course of the trial a witness was produced who had been a juror in the previous jury trial, and she testified that during the course of the first trial she and other jurors from time to time would go into the cafeteria at Temple and Broadway where, during recesses and before court, they would see Blau and Fisher at work in the restaurant, and occasionally they spoke to them, passing the time of day. That upon one occasion she was in line at the cafeteria getting her food, and she stated that the defendants made some remarks, she "did not know whether they were talking to me or making remarks." She stated that Fisher said, "After the case was over he was going to take the jury out to dinner," and Blau said, "He hoped some of the jurors would see it their way, it would be to our advantage." This was at a time when they were in line to purchase their meals, with people both in front of them and in back of them; that she "was busy picking out what she wanted to eat."

Blau and Fisher both denied these remarks, stating that they had seen numerous of the jurors in the restaurant during the trial and made no improper remarks to any of them.

Mays testified that he was a truck driver-salesman; that he had called on numerous of the customers and

the various receiving clerks who had testified; that he never made any improper representations nor, so far as he knew, ever took any overages and never delivered any short loads of drums. That he was in and out of the plants repeatedly, sometimes they had to make two or three trips to complete a delivery, and usually the load was signed for after the delivery had been completed. That any bonus he received was a Christmas bonus such as other employees received.

The trial court, over objections, permitted the prosecution to call a District Attorney's investigator, McGrath, to testify with reference to a conversation with Blau in 1946 or 1947. It dealt with the question of rationing, and the implication was that Blau was engaged in "black market" meat operations and violating federal statutes.

The trial court permitted investigators to testify what was overheard in telephone conversations between the petitioners and one of the alleged co-conspirators. This was done through the use of an extension telephone without the knowledge or consent of the petitioners.

The trial court admitted evidence with reference to the acts and declarations of co-conspirators made out of the presence of the accused petitioners, and also permitted evidence to be admitted which was not shown to have been done in furtherance of the common object and design for which the defendants allegedly combined.

One of the jurors, Mary A. Grooms, after the guilty verdict was returned, signed an affidavit which was filed in support of the motion for a new trial, which clearly indicated that the verdict of guilty as to Blau and Fisher was reached on the basis of a compromise [Certified Record, Vol. I, Supp. Clk. Tr. pp. 7-9].

ARGUMENT.

The judgment of the Courts below should be reversed for the following reasons:

1. The conviction of Count One, to-wit, conspiracy, should be reversed insofar as Section 3020(b) of the California Corporations Code is concerned, so that it may be determined whether the imprisonment is to be for a period of six months to three years, or for a period of three years to ten years, so as not to inflict cruel and inhuman punishment.

2. There was a denial of due process of law in admitting prejudicial evidence concerning an unrelated subject of meat rationing, which occurred years before the charges contained in the information.

3. There was denial of due process of law in admitting evidence of telephone conversations unlawfully or illegally obtained.

4. The petitioners were twice put in jeopardy for the same offense in violation of the Fifth Amendment to the United States Constitution.

5. There was a denial of due process of law by the jury arriving at a verdict by compromise.

6. There was a denial of due process of law by the trial court admitting evidence with reference to the acts and declarations of co-conspirators made out of the presence of the accused.

7. There was a denial of due process of law by the trial court admitting evidence of acts not done in furtherance of the common objective for which the defendants allegedly combined.

8. There was a denial of due process of law in the assignment of the case for trial contrary to the usual procedure prevailing in the Court.

9. The petitioners further contend that the court erred in refusing to give the two reasonable theories instruction proffered by the defendants and appellants, this being a case which involved a substantial amount of circumstantial evidence, and the Supreme Court of California, subsequent to the affirmation of the conviction herein, reversed a murder case where the trial court had failed to give the "two reasonable theories" instruction.

See:

People v. Merkouris, 46 A. C. 547, 566.

I.

Since the District Court of Appeal in Its Opinion Held That the Evidence Was Insufficient to Warrant a Conviction of Conspiracy to Violate Section 3020-(b) of the California Corporations Code, It Should Have Reversed the Conviction of Conspiracy Contained in Count One Insofar as It Related to Section 3020(b) of the California Corporations Code.

Otherwise, the punishment that the petitioners may be required to suffer will be imprisonment in the State Prison for a period of from three years to ten years, instead of a period of from six months to three years, which would be the case where the petitioners stand only convicted of conspiracy to commit petty theft.

To allow the judgment of conviction to remain as it is presently constituted would cause the infliction of cruel and inhuman punishment. Contrary to the Eighth Amendment to the United States Constitution.

II.

McGrath Incident.

The McGrath incident certainly was a denial of due process of law. The trial court grossly erred in permitting the Deputy District Attorney to call McGrath, a District Attorney's investigator, to testify with reference to a conversation with Blau in 1946 or 1947. It dealt with the question of rationing, and the implication was that Blau was engaged in "black market" operations, and violating Federal statutes. It was a vicious piece of evidence, and we respectfully urge transcends the ruling laid down in *Rochin v. California,* 342 U. S. 165, and it undoubtedly raises a substantial Federal question, for the Supreme Court in *Rochin, supra,* said that it had the right to review state cases and their prosecution from its inception, to the end that no miscarriage of justice result.

III.

Evidence of Telephone Conversations Unlawfully or Illegally Obtained Was Not Admissible.

People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905.

No person not being authorized by the sender shall intercept any telephone conversation and divulge or publish its existence.

47 *U. S. C. A.,* Sec. 605.

The interception of a telephone call within Section 605 of 47 United States Code Annotated, involves the idea that a speaker thinks he is talking to one person, whereas, in fact, a third person is surreptitiously listening.

Billeci v. United States, 184 F. 2d 394.

A message is intercepted and divulged whenever anyone causes the message to be transmitted to a third person without the consent of the sender.

United States v. Gruber, 123 F. 2d 307.

Intrastate messages come within Section 605 of 47 United States Code Annotated.

McGuire v. Amrain, 101 Fed. Supp. 414;

Weiss v. United States, 308 U. S. 321.

We respectfully urge upon this Court that we think a substantial Federal question has herein been stated in connection with this matter, and that it amounts to a violation of due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

IV.
Jeopardy Plea.

We respectfully urge that the jeopardy plea question raised at the time of trial and in our briefs represents a substantial Federal question. Amendment V to the Constitution of the United States provides, among other things, "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb: * * *"

Ex parte Harron, 191 Cal. 457, 217 Pac. 728, 731;

Jackson v. Superior Court, 10 Cal. 2d 350, 74 P. 2d 243, 246.

V.
Affidavit of Juror.

The affidavit of Mary A. Grooms, one of the jurors, was submitted to the Court in support of the motion for new trial. The affidavit set forth occurrences in the jury room, and pointed out that some of the jurors wanted to go home, and an agreement was worked out whereby the jurors would vote not guilty as to Mays, provided the jurors holding out for acquittal would vote guilty on Blau and Fisher. This was not denied, and it must be assumed to be the truth. We recognize that the law does not favor jurors' impeaching their own verdicts, but we believe the time has come when this law must be carefully reconsidered in the light of modern interpretations of the law.

We have examined the law in various jurisdictions and in the United States courts, and we do not believe that the rule can be better stated than was said in an old case, *United States v. Reid,* 53 U. S. 361, 366, 13 L. Ed. 1023, 1025:

> "The first branch of the second point presents the question, whether the affidavits of jurors impeaching their verdict ought to be received.
>
> "It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. *But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice."* (Emphasis ours.)

This quotation has been cited in numerous jurisdictions and in texts, for example:

Boyles v. People, 90 Colo. 32, 6 P. 2d 7, 10;

See also:

Cal. Pen. Code, Sec. 1181, subds. 3 and 4.

VI.

The Trial Court, in Admitting Evidence With Reference to the Acts and Declarations of Co-conspirators Made Out of the Presence of the Accused, Was in Error.

People v. Busby, 40 Cal. App. 2d 193, 104 P. 2d 531;

People v. Kelly, 133 Cal. 1, 64 Pac. 1091.

Statements made by one defendant outside the presence of his co-defendant, and after consummation or frustration of the conspiracy, are hearsay.

People v. Gilliland, 39 Cal. App. 2d 250, 103 P. 2d 179;

People v. Doble, 203 Cal. 510, 265 Pac. 184;

People v. Singh, 1 Cal. App. 2d 729, 37 P. 2d 481.

VII.

Acts of Co-conspirators.

In order that an act of a co-defendant may be imputed to a defendant in a criminal action, the particular act must be shown to have been done in furtherance of the common object and design for which the defendants have combined.

People v. Werner, 16 Cal. App. 2d 216, 105 P. 2d 927.

May we point out that evidence was introduced of events which occurred prior to the alleged beginning date of the alleged conspiracy, to-wit: April 13, 1953. Some of these acts and declarations were made in 1950 and 1951. It has been said that declarations by a conspirator

showing past acts are not binding upon the alleged co-conspirator.

People v. Ericson, 68 Cal. App. 307;
People v. Irwin, 67 Cal. 494.

Acts which occurred in 1950 and 1951 were entirely unconnected with Fisher, and were inadmissible against the subsequent conspirator, if he be one.

See:

Morrow v. United States, 11 F. 2d 256.

VIII.

Unusual Manner Handling Case.

The record discloses that the Presiding Judge of the Criminal Master Calendar Department singled this case out to be handled in a manner different from the usual and regular procedure of handling criminal cases in the Superior Court of Los Angeles County. The regular procedure for the handling of criminal cases is set forth in detail in the affidavit of Russell E. Parsons [Certified Record, Vol. I, Supp. Clk. Tr. pp. 10-15]. When it was clear that the case was being handled in a manner different from the regular procedure for the disposition of criminal trials, the defendants objected and moved the Court to assign the case to a regularly constituted trial department of the Superior Court, the objections and motions were denied.

Treating this case differently without any proper showing therefor amounts to a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

IX.

The Court Erred in Refusing to Give the "Two Reasonable Theories" Instruction to the Jury.

May we point out that at pages 153, 157 of the Clerk's Transcript of the proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, are the proposed instructions covering two reasonable theories, all of which were refused by the trial court, and no instruction on this same rule was given to the jury; they were only instructed generally as to circumstantial evidence.

In the case of *People v. Merkouris*, 46 A. C. 547, at page 568, dated June 5, 1956, which was a case arising out of a murder, the court had this to say in reversing the conviction of Merkouris, at least in part upon the failure of the trial court to give the two reasonable theories instruction:

> "The jury could have disbelieved the identification testimony of Mr. Yonadi who said it was the defendant he saw coming out of the back gate; it could have disbelieved the testimony of Mrs. Simons who said that the defendant was the man she had seen in the areaway because she recognized 'the lower part of the face' from a colored picture. Under the circumstances here presented, that part of defendant's instruction bearing upon two reasonable interpretations or constructions of the evidence should have been given."

The Court went on to say further in *People v. Merkouris, supra*, at page 567:

> "In a criminal case the prosecution must prove the defendant guilty beyond a reasonable doubt.

> Therefore, if the evidence is equally balanced, the defendant is entitled to an acquittal. Further, there is nothing in the proposed instruction inconsistent with the instruction on reasonable doubt. The offered instruction was a correct statement of the applicable law and should have been given."

See, also:

> *People v. Bender*, 27 Cal. 2d 164, 175, 177, 163 P. 2d 8.

In that case the Supreme Court of California said, "the court itself should have given the instruction on its own motion."

The District Court of Appeal overruled this contention and referred to an instruction which they felt covered the subject. We earnestly contend it did not. See Opinion of the District Court of Appeal attached to Petition for Hearing in the Supreme Court of California, at pages 28 and 29, where the court said:

> "The People quote an instruction that the court gave, reading: 'I instruct you further that you are not permitted, on circumstantial evidence alone, to find a defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime but are irreconcilable with any other rational conclusion.' This is a sufficient answer to the criticism of the court's failure to give appellants' requested instruction."

We earnestly contend that this instruction does not meet the requirements of the law, and it would, indeed, be a denial of due process if this conviction is permitted to

stand, where the Supreme Court of California has laid down the rule that the two reasonable theories instruction must be given.

People v. Merkouris, supra.

It is fundamental to the doctrine of due process that no court shall deprive any party of a substantive right arbitrarily or capriciously. This Court has been zealous in examining the records of litigation carried on in State courts where there is a showing that a reasonable basis exists for supposing that rights guaranteed by the Federal Constitution have been denied or ignored.

Dixon v. Duffy, 344 U. S. 143, 145 (1952);

Jennings v. Illinois, 342 U. S. 104 (1951).

In *Craig v. Harney,* 331 U. S. 367, 373 (1946), this Court said:

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, an independent examination of the facts by this Court is often required to be made. (Citations.)"

Conclusion.

Wherefore, your petitioners pray that this Court issue a writ of certiorari to the District Court of Appeal of the State of California in and for the Second Appellate District, Division Three thereof, and that the judgment of said Court be reversed, to the end that these petitioners may have a full and fair trial in the Superior Court of the State of California in and for the County of Los Angeles.

Respectfully submitted

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

Attorneys for Petitioners.

ALBERT JACK CHOTINER,
Of Counsel.

APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent vs. Sidney Blau *et al.*, Defendants; Sidney Blau and Sidney Fisher, Appellants. Criminal No. 5371.

Filed March 23, 1956.

Appeal from judgment and order of the Superior Court of Los Angeles County, Arthur Crum, Judge. Affirmed and reversed.

For Appellants: Murray M. Chotiner, Albert Jack Chotiner and Russell E. Parsons.

For Respondent: Edmund G. Brown, Attorney General; Martin M. Ostrow, Deputy Attorney General.

Sidney Blau, Sidney Fisher, Joseph Mays and Mike Meceirow were accused by information of criminal conspiracy in that they did conspire with each other and with Joseph A. Ricca, William Vincent Johnston, Kenneth K. Olson, Richard G. Costan, Edward L. Waymire, Jerry Goddard, Edward Butterfield and Jerry Wells to commit theft in violation of Section 484 of the Penal Code and "falsify corporate records" (not naming the corporation) in violation of Section 3020, Subd. (b) of the Corporations Code. By Count II of the information they were accused of grand theft on or about October 1, 1953 and by Count III of grand theft on or about December 7, 1953, in the taking of money from Andrew Brown Company, a corporation. The alleged conspirators other than Blau, Fisher, Mays and Meceirow were not accused of any offenses by the information. In due course the

cause came on for trial. On July 27, 1954, certain proceedings were had in Department 44 of the Superior Court respecting a proposed submission of the cause on the transcript of the preliminary hearing and for waiver of a jury trial; the waiver of jury trial and consent to submit the cause on the preliminary transcript was vacated on motion of the People and the cause was set for trial to a jury; the cause was tried and submitted; a verdict was returned finding Meceirow not guilty; there being no verdict as to defendants Blau, Fisher and Mays and upon stipulation of counsel a mistrial was declared and the cause was retransferred to Department 44 for resetting; it was assigned to Department 46 for trial to a jury and in that trial Mays was acquitted and Blau and Fisher were convicted of violation of Count I of the information as charged and of petty theft as charged in Counts II and III of the information. They made a motion for new trial which was denied and they appeal for a new trial.

The first contention of the appellants to be noticed is that the only substantial evidence against them was the uncorroborated testimony of witnesses who were accomplices and who were named as co-conspirators although not charged as defendants. It is not questioned that the conduct and statements of the appellants as described by these witnesses were sufficient to constitute the offenses of theft and conspiracy to commit theft.

Blau and Fisher were brothers-in-law. From 1946 Blau had operated a company called American Drum Company, hereinafter called American. His business was the buying, selling and servicing of steel drums. With Fisher, Blau also operated a cafeteria in the civic center in Los

Angeles. Fisher left this business in 1952 and went to work for American. The company had 50 or 60 customers and handled many thousands of drums in a year's time. To one customer alone, Pioneer Flintkote, it sold in 1952 between 9,000 and 10,000 drums. Its servicing business consisted of cleaning and repainting drums, and was conducted on a large scale. It was constantly buying drums wherever they could be obtained. Its purchases were made in part through its drivers and from peddlers. The drivers were furnished with $50 each morning and bought drums for cash. The prices ranged from $1 to $3 or $4. Drums were sometimes acquired in small numbers from businesses that wished to get rid of them and made no charge for them. Purchases in large numbers were made when the same were available. American was in sharp competition with H. Levine Cooperage Company, hereinafter called Levine, which was described as one of the largest cooperage companies in the country and which also bought, sold and processed drums. It was the duty of Levine's drivers to purchase drums. Both Blau and Fisher were active in the operation of their company. Fisher attended to most of the office work and Blau had control of the money. The evidence of the People consisted principally of testimony of employes of Levine and of customers of American. These witnesses had confessed to peculations from their employers and they implicated Blau and Fisher and American's drivers, Mays and Meceirow, in numerous transactions. Generally speaking, these witnesses testified to having cheated their employers by buying drums upon the credit of Levine and selling them to American, by delivering to American more drums than were receipted for and by giving receipts for more drums than were delivered by American to the con-

cerns for which the witnesses were working as purchasing agents or receiving clerks. They testified that in all these transactions they were given money by Blau, Fisher or their drivers for each drum lost to their employers through their various methods of cheating. Several of the witnesses testified that these schemes originated with Blau and that Fisher had knowledge of the same and participated directly in some of the transactions. Others testified their arrangements were made with Mays or Meceirow.

No contention is made that the testimony of the accomplices with respect to the fraudulent scheme was incomplete in any respect. The crucial question is whether there was evidence sufficient in law to establish guilty knowledge and participation in the thefts or any of them on the part of Blau and Fisher. We have concluded that there was sufficient evidence to establish the necessary corroboration of the testimony of the accomplices.

Many witnesses testified and the record is voluminous. It would serve no good purpose to state the testimony of the conspirators at length. The substance of their testimony will be stated. The matter of corroboration will be discussed later.

Jerry Goddard testified that commencing in April 1953 he was a buyer of used drums for Levine. In August, in the presence of his brother-in-law Waymire, Mays and Meceirow, Blau suggested that he (Goddard) could make some money on the side and that he and Waymire could each make as much as $5,000 a year and that Waymire would explain to him how it could be done. He learned from Waymire what Blau meant. He (Goddard) purchased 98 drums which he charged to Levine and

upon instructions from Blau delivered them to the Garfield dump; he telephoned Fisher who said there would be a driver there to pick them up; Mays met Goddard at the dump, hauled the drums away and he (Goddard) received money from Waymire. In October Blau requested more drums. In November Goddard left 45 drums at the dump; these had been purchased on Levine's credit; November 28 he drove to the dump with 77 drums which he had purchased for Levine's account. He telephoned Fisher who arranged to have the drums picked up. He received money from Waymire. Shortly thereafter Goddard when accused by detectives and police officers admitted his dishonest transactions with American. December 17 at the request of one Duber, a detective employed by Levine, Goddard called Blau and told him he had some more drums; Blau replied that he had better lay off because he, Blau, had discovered a "bug" in his office and that things were hot and for Goddard to take the drums back to the Levine plant. On the same day Goddard left 68 drums at the dump and notified Fisher. He told Mays over the telephone where the drums had been left and Mays said he would pick them up. He went with Waymire to American where Waymire collected $108 from Blau which he turned over to a Mr. Forbes, a district attorney investigator.

Waymire was employed as shipping clerk for Levine. He testified that during a former employment with Andrew Brown Company he had furnished drums to Blau, had been paid for them and divided the money with one Wells and one Butterfield, in July or August 1953, while employed by Levine, he discussed with Blau the subject of taking drums from Levine to American Drum; they would be left at a place where American could pick them

up. He met again with Blau and Fisher and they arranged to have the drums left at the Garfield dump; Blau took Waymire to the dump. He collected from American $180 for the drums which Goddard had delivered on September 23 and he divided with Goddard. In October he and Waymire met Blau at the latter's home. Blau wanted him to bring more drums. In November Waymire discussed the delivery of drums with Blau and Fisher; he received money for the drums, which he divided with Goddard. On December 17 he went to American's office to see the defendants; Fisher pointed to the ceiling where the "bug" had been discovered. He (Waymire) was paid $108 for the drums that had been left at the dump and this money was turned over to Mr. Forbes.

One Ricca testified that he was an employe of the California Extraction Company and in charge of the purchase of drums. In July 1952 Mays suggested that if he (Ricca) was short of money something could be worked out on drums. Mays discussed the matter of Ricca's buying drums in July and September 1953 and promised Ricca $1.25 for every drum he signed for that was not delivered. On November 20 Ricca called May and asked for a full load of drums, telling him to make out a ticket for 140 drums and to bring only 60. Mays brought a delivery slip for 140 drums and $100 in cash. Ricca receipted for the drums and received the money. December 14 Ricca called Mays and asked for 120 drums and said he would sign for them. He went to American's office, signed a delivery slip for 120 drums and received from Fisher $150. December 17, after Ricca had admitted his thefts, he called Mays and asked for a delivery ticket for 120 drums. Mays drove in his truck, gave Ricca a receiving ticket for 120 drums and $150 in cash; Ricca

signed the delivery slip. After his thefts had been discovered by his employer he went to American where Blau offered to give him the money to pay for the drum shortage and wanted Ricca to call Mr. Jerome, owner of Ricca's company, and arrange with him to make a deal which Blau said would clear Mays of any conspiracy.

One Johnston testified that he was foreman of Pioneer Flintkote, handling drums. In February 1953 Mays told him he could make some extra money by shipping out more drums to American for cleaning than were receipted for and that he would be paid for those extra drums. In April 1952 10 more drums were put on Mays' truck than were receipted for and he was paid money. In September 1952 Johnston borrowed $300 from Blau who said it would be repaid in similar drum transactions. In January and February 1953 Mays picked up a load of drums for which no confirmation was given. Johnston went to see Blau, saying it was too many drums to go out at once, but Blau insisted the shortage would not show up and said to let the matter stand and it would finish paying off Johnston's debt of $300. In May 1953 Fisher paid Johnston $15 to cover a shortage of 10 drums and later Johnston was paid $15 for another shortage of 10 drums. Johnston gave a receipt for a delivery on November 24, for 134 drums, when 124 were delivered and a receipt for 108 drums when only 100 were received. For the shortage of 18 drums Fisher paid Johnston $27. Between April 1952 and September 1953 there were 18 or 20 such transactions involving drums coming into or going out of Flintkote and Johnston was paid for all the shortages by either Mays, Fisher or Blau. December 3, American took another truck load without confirmation slip. On the following day Blau paid Johnston

$165. A few days later Johnston borrowed $100 from Blau and arranged that it was to be repaid through similar drum transactions.

One Olson handled drums for W. P. Fuller Co. in May, 1953, Meceirow, making deliveries for American, presented to Olson 2 receipts, one for 10 more drums than the other. When Meceirow explained that Olson would be paid for signing the receipt for the greater number, he signed a slip for 33 drums although only 23 were delivered, and was given $20 by Meceirow. November 12 Olson had 90 drums loaded on Mays' truck and Mays signed a receipt for only 84 drums and paid Olson $6. There were 4 or 5 other similar transactions in which Olson was paid $1 to $2 a drum. He testified that altogether there were shortages amounting to 100 or 125 drums; sometimes he received $1, sometimes $2 per drum; the total amount he received was around $150 but he signed a note to Fuller's Bonding company for $500.

One Coston was the receiving clerk for Arco. In the fall of 1950 Blau asked him if he would sign delivery receipts for drums not delivered by American for which he would be paid. After this he signed fictitious delivery slips in Blau's office and was paid in cash. From the fall of 1950 until around Christmas 1951, he was paid for approximately 35 transactions involving shortages of drums in American's deliveries. After an interval in which no business was done with American and between February and November 1953 there were about 25 more shortages of drums in American's deliveries for which Coston was paid. On December 16 he received from Meceirow $60 for a shortage of 40 drums. After Coston's thefts had been discovered he had a telephone conversation with Fisher January 18, 1954. Fisher informed Cos-

ton, who was living in Las Vegas, that Blau and Mays were coming to see him. They went to Las Vegas, discussed the matter with Coston and told hi mhis confession amounted to nothing because it was given under intimidation.

Edward Butterfield was receiving clerk for Andrew Brown Company from April to December 1953. During a previous term of employment he had had a conversation with Blau in the summer of 1951 in which it was arranged that Butterfield would be paid for shortages in deliveries of drums. There were about 2 shortages during the summer of 1951. Butterfield left the employ of Brown in October 1951 and returned in April 1953. Between April and December 1953 there were 5 or 6 transactions involving fictitious delivery slips signed by Butterfield when no deliveries were made, for which Butterfield was paid $750. He testified that these delivery slips were typed by Fisher either at Blau's or Fisher's apartment and on a black portable typewriter. Butterfield was paid from 50¢ to $1 per drum. Yellow copies of the receipts were put in Brown Company files. Brown Company paid for all these fictitious deliveries, the slips of which were identified by Butterfield. One receipt dated December 16, 1953 was for 24 drums when only 20 were delivered. The shortage was discovered by an accountant. American was called on the telephone; Fisher explained that it was a typographical error and it was corrected. Butterfield's thefts were discovered in December 1953.

There were introduced on behalf of the people numerous exhibits identified with many of the drum transactions. One was a charge slip showing the purchase on Levine's account of 77 drums which Goddard testified he sold

to American. Another was a charge slip for 98 drums also delivered to American by Goddard and 2 receipts, one showing the purchase of 6 drums and the other 7 drums on Levine's account. Numerous delivery slips were identified and placed in evidence. Of these it may be said, generally, that they corroborated the testimony of the several witnesses that they had issued such receipt. There was a receipt signed by Ricca November 20 for 140 drums; a receipt for 120 drums signed by Ricca December 14 and another receipt for 120 drums; a receipt dated November 20 signed by Obrite for 140 drums, one dated December 16 for 20 drums and one dated December 17 for 120 drums, one dated September 4, 1953 for 12 drums, another of the same date for 68 drums which was signed by Johnston; a receipt dated November 24 for 25 drums and one of the same date for 109 drums signed by Johnston. There was a record made out by Coston indicating the receipt of 100 drums on November 17 and another record of a delivery of 37 drums on November 30; and a record calling for 100 drums to go out December 16 when, according to Coston, 140 drums were delivered to American; also another record calling for delivery of 100 drums to Arco on December 17. Butterfield identified typed delivery slips which he testified were fictitious and which indicated deliveries to Andrew Brown Company. These bore dates from October 2, 1953 to December 12, 1953 and were 12 in number, also checks of Brown Company showing payments for these deliveries. There was another delivery ticket dated December 16 showing a change from 24 drums to 20 drums which was corrected by American. The delivery tickets furnished corroboration of the testimony of the accomplice witnesses that receipts had been

given evidencing the delivery to the employers of the witnesses of certain number of drums although there was nothing upon these receipts and records to indicate that the numbers of drums receipted for had not been delivered on the several dates on which the receipts were issued.

The records of Levine Company were corroborative of the testimony of Goddard that the 77 drums and the 98 drums, which he testified were delivered to American, were the property of Levine. In addition to the foregoing evidence testimony was given by detectives employed by Levine. One Duber was employed to investigate Levine's transactions with American some time in October 1953. He testified that on November 28, he followed a Levine truck driven by Goddard to the Garfield dump. There were 77 drums on the truck. On the way Goddard had stopped and made a phone call. He saw the 77 drums transferred to an American truck from the Levine truck and saw the American truck return to the American yards.

On December 15 Goddard was interviewed by Coker, a detective in the employ of Duber, and by two police officers, and confessed his thefts. Don M. Forbes, an investigator from the district attorney's office, testified that on December 17 he saw Goddard leave the Levine plant with 68 drums which he took to the Garfield dump, that he saw them picked up by Mays driving an American truck on December 22 and saw the American truck with the drums return to the American plant; on the same day he searched Waymire's pockets and took what money he had; saw Waymire enter the American office around 6 p.m.; looked through a window and saw Waymire, Blau

and Fisher; Blau put what appeared to be money on the desk in front of Waymire who picked it up and put it in his pocket; 5 minutes later he met Waymire at Atlantic and Florence and received $108 from him.

Coker testified that on November 17 he saw an American truck loaded at the plant with 50 black drums; he saw the truck enter the yard of Arco, a customer of American and leave empty 10 minutes later. He did not identify the truck driver. He also testified that on November 20 he saw an American truck driven by Mays arrive at California Extraction Company with 60 drums. He did not see Ricca. Forbes testified that on the morning of December 17 he saw Mays driving an empty American truck into California Extraction; Mays handed Ricca something on which Ricca wrote; Mays gave Ricca a piece of paper and 2 other objects; after Mays left, Ricca gave him (Forbes) a delivery receipt for 120 drums, a calendar and $150 cash.

Coker also testified that on November 12, 1953, he saw an American truck fully loaded with 140 drums leave that W. P. Fuller Company plant and that on November 24 he saw an American truck loaded with 124 drums go to Flintkote but did not count the drums at Flintkote. On November 20 he saw the truck take 100 drums from American but did not recognize either of the drivers.

Forbes testified that he listened in on the phone in December when Goddard was talking with Blau and Mays and his testimony corresponded with that of Goddard with reference to those conversations. His testimony was the same as that of Waymire as to the conversation with Blau respecting the 68 drums.

Butterfield identified a number of delivery slips, which he testified were fictitious. These were written by Fisher on a black portable typewriter on American delivery ticket forms. He had signed them and returned the yellow carbon copy to Andrew Brown Company; Blau kept the originals. B. P. Yanez, an investigator for the district attorney's office was shown a black portable typewriter and testified that he first saw it at Fisher's residence on March 2, 1954. He identified a standard type typewriter as one he had first seen at American's office February 26 or 27, 1954. Donn E. Mire, an examiner of questioned documents, employed by the district attorney, testified that a delivery ticket No. 3785 was typed in part on the portable and in part by the standard typewriter and that 6 other exhibits shown him, all relating to the Andrew Brown account, were typed in part or in whole on the black portable typewriter and other portions on the standard typewriter. There was evidence that all the delivery tickets typed on the portable typewriter were fictitious.

Defendant Fisher testified that he went into the drum business with Blau in 1952, invested no money but was to get a share of the profits. He drew $75 per week which was raised to $125 when he gave up working in the cafeteria. His duties with the company included buying materials and supplies, buying drums from peddlers, hiring and firing; he had charge of the office, assisted with the books and payroll, handled calls and made deliveries. Sometimes when the girl in the office was busy, he would make out delivery tickets on the portable typewriter; at times they would be commenced on one typewriter and finished on another. There were times when several delivery slips would be signed to correspond with several orders although there would be but one combined delivery.

As we have mentioned, there was no standard price for drums but the amounts given to employes of the customers in cases of shortages were below the value of the drums. Goddard testified that the 98 drums he delivered to the dump on September 23 were charged to Levine Fiber Company at $2 apiece or $196, and that he received as his half from Waymire $90 to $95. The 45 drums he took to the dump on November 27 were bought for $82, 25 at $2 apiece, and 20 at $1.60 apiece and they were charged to Levine. The 77 drums he delivered on November 27 were purchased at $1.50 each, or a total of $115.50. He received from Waymire as his share from the sale of the 45 and the 77 drums $80 or $90. He did not question Waymire as to the difference between the cost of 98 drums and the supposed selling price. He received for all the drums taken from Levine the fair market price of the drums. He reported none of his receipts in his income tax returns. As to the prices paid by American Waymire's testimony was substantially to the same effect. Neither Goddard nor Waymire kept any account of the moneys they received. They approximated those amounts.

Butterfield testified that he received $1 or $1.50 for each missing drum in deliveries to or from Andrew Brown Company. He testified some reconditioned, used, thinner drums were worth $4.50 each. It was these drums that were covered by the fictitious transactions. Some drums that needed reconditioning were worth $3.25 each.

In the foregoing recital we have not stated all the evidence that was corroborative of the testimony of the accomplices nor have we recited all the testimony which they gave with respect to their direct dealings with ap-

pellants. Considered by itself, the testimony of the accomplices could not be deemed sufficient to establish the existence of a conspiracy with the appellants or Mays and Meceirow. As we have stated, there was no direct evidence other than the testimony of the accomplices fastening upon appellants' knowledge of the thefts. There was direct corroboration as to comparatively few of the many transactions to which the accomplices testified. But this evidence, as we shall see, was sufficient when considered with the indirect evidence not only as corroboration of the testimony of the accomplices as to the existence of a conspiracy but also of their testimony of the knowledge of appellants of the scheme and their participation therein.

As previously mentioned there were many exhibits consisting of delivery tickets, originals and copies, which corresponded with the testimony of several of the accomplices with respect to receipts which they had given or received. We shall mention but a few of them.

Coker testified that on November 17 he witnessed the loading of an American truck with 50 drums which were taken to Arco. An exhibit received in evidence was a record of Arco made out by Coston showing receipt by Arco of 100 drums. Coston had testified to this effect. Coker also testified that on November 20 he saw 100 drums loaded at American for delivery to Flintkote. An invoice and delivery slips were introduced in evidence showing receipt of 108 drums by Flintkote. On November 24 Coker watched an American truck being loaded with 124 drums and followed it to Flintkote where they were delivered. Flintkote's delivery receipts were issued for 134 drums. There were other receipts which Johnston testified were for 8 more drums than were delivered. This

evidence was corroborative of the testimony of Johnston that there was a shortage of 18 drums in the two deliveries for which he was paid $27 by Fisher. Coker also testified that on November 12 he saw 90 drums loaded at Flintkote by American. Flintkote's record showed that a receipt was given for only 84 drums. He also testified that on November 20 he saw 60 drums loaded at American, for delivery to California Extraction where delivery was made. A delivery slip in evidence was a receipt on that date for 120 drums. Ricca had testified that in this transaction in which only 60 drums were delivered, he was paid $100 for the ones that were missing. Forbes testified that on December 17 he saw Mays drive into California Extraction in an empty American truck, saw him hand Ricca something on which Ricca wrote, saw him give Ricca a piece of paper and two other objects and that after Mays left Ricca gave him (Forbes) a copy of the delivery receipt for 120 drums and $150 in cash. There was convincing evidence of the existence of a conspiracy.

The corroborative evidence with respect to the guilty knowledge of appellants must be weighed in view of the fact that Levine, Brown Company, Arco, California Extraction, Fuller Co. and Pioneer Flintkote had been systematically defrauded in their dealings with American. The testimony of Coker and Forbes, considered with the documentary evidence, substantially corroborated the testimony of the seven employes, Goddard, Waymire, Butterfield, Ricca, Olson, Coston and Johnston, who represented their companies in dealing with American, as to the existence of a concerted plan of theft. And these seven men who had been corrupted by some representatives of American had confessed their wrongdoing. The appel-

lants say that if there were thefts from American's customers they had no knowledge of it, which, if true, would fasten the entire blame on the drivers Mays and Meceirow. This is not a reasonable explanation. When Goddard delivered drums to the dump they were sold to American, not to Mays or Meceirow. When there were shortages in American's deliveries the customers paid American, not Mays or Meceirow, for drums for which they had receipted but had not received. There were necessarily countless discrepancies between American's records and the number of drums on hand. A few might have gone unnoticed but in the multitude of instances of pickups in excess of numbers receipted for and numbers receipted for in excess of those delivered the inventories of American as shown by count would have vastly exceeded in the aggregate the numbers on the records.

Fisher had charge of the delivery and receipt of drums. The delivery slips typed on the typewriter which he used were identified as fictitious. None was genuine. It is scarcely conceivable that he could have remained in ignorance of the discrepancies between the numbers of drums brought into or taken from the plant and the receipts signed by American's drivers or the receiving clerks of the customers. Neither is it conceivable that Fisher, who owned no interest in the business, was consistently fleecing its customers unknown to Blau.

In addition to the evidence relative to shortage in deliveries the transactions with Goddard and Waymire disclosed the eagerness of appellants to obtain drums wherever they might be had, even from employes of Levine whom they knew to be under suspicion.

Appellants contend that they believed the drums purchased from Goddard had been purchased by him and

Waymire for resale and did not suspect that they had been purchased on Levine's credit. There was no direct evidence that they knew the drums did not belong to Goddard and Waymire. There were, however circumstances which tended to disprove their assertions of innocence. By prearrangement, exchanges from Levine trucks to American trucks were made at the Garfield dump. Defendants knew it to be the practice for drivers to purchase drums for their employers and that Goddard and Waymire were working for Levine. They say they adopted the furtive method of exchange because they wished to conceal the transactions from Levine, knowing it was the duty of Goddard and Waymire to give Levine the benefit of their purchases. They knew Goddard and Waymire were unfaithful to their employer and they knew that for their unfaithfulness they sought some personal advantage. They did not claim they inquired why Goddard and Waymire would sell drums to them instead of taking them to the Levine plant, nor did they investigate Goddard's claim of ownership. It was less apparent that they trusted to the honesty of the men they were dealing with than that they were indifferent as to how far their dishonesty might go. The jury could have believed with good reason that defendants were encouraging Goddard and Waymire in their dishonesty and willing to profit by it. The stealthy and sordid methods employed by appellants, in which they saw no wrong, was indicative of their standards of business integrity.

We have stated the substance of the corroborative evidence and that we deem it sufficient in law. The test of sufficiency is stated in section 1111 Penal Code. It is "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evi-

dence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." It has been stated frequently that even slight evidence is sufficient if it tends to connect the defendant with the commisison of the offense. This, of course, does not mean evidence that raises merely a suspicion, even though a strong one, of connection with the offense. (People v. Davis, 210 Cal. 540.) At least as a guide to a reviewing court, judging the sufficiency of corroboration, the rule is that the corroborative evidence is sufficient if it"tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." And in determining this question the corroborative evidence must be considered without the aid of the testimony which is to be corroborated and it is not sufficient if it requires the interpretation and direction of such testimony in order to give it value. (People v. MacEwing, 45 A. C. 243, 249.) It is, of course, well-settled that there is no need for corroboration of the entire testimony of an accomplice. (People v. Temple, 102 Cal. App. 2d 270.)

In the present case, the jury having found the corroborative evidence to be sufficient to connect appellants with the commission of the offense of conspiracy to commit theft, the question we have answered is merely whether the evidence reasonably justified that factual conclusion. It would be futile to attempt a comparison of the evidence in the present case with that in other cases which involved the sufficiency of corroborative evidence. The facts of our case are unique. We have already stated our reasons for holding that the implied finding of the

jury was a reasonable conclusion with respect to the existence of the conspiracy; upon that issue the independent, direct evidence, to say nothing of the circumstantial evidence, furnished strong corroboration of the testimony of the accomplices. It was firmly established that there was a conspiracy between the representatives of American and the employes of the customers who were systematically defrauded. The representatives of American, parties to the conspiracy, were Blau, Fisher, Mays and Meceirow, or some of them. The corroborative evidence which tended to connect Blau and Fisher with the conspiracy also implicated Mays and Meceirow but was wholly inconsistent with the claim that only the latter two could have been the conspirators on the side of American. Although the independent evidence which tended to implicate Blau and Fisher was circumstantial, it was convincing, and it pointed to them as the principals and ringleaders more logically than to the drivers who were acquitted by different juries. And this being true, and the corroboration being legally sufficient, the added testimony of the accomplices with respect to the direct and active participation of appellants in the unlawful scheme furnished satisfactory evidence of their guilt.

In an elaborate argument appellants call attention to particulars in which the testimony of the accomplices was contradictory and to the facts that most of them were retained in their employments and were not prosecuted, claiming that they were offered inducements to give testimony favorable to the People. The argument also dwells upon the explanations and the denials uttered by appellants. But counsel must realize that in passing upon the sufficiency of the evidence a reviewing court must give it the effect most favorable to the validity of the judgment.

The case long since passed the stage when the credibility of the witnesses was in issue.

The second contention of appellants is that the evidence was insufficient to prove the offenses of petty theft, being lesser offenses necessarily included in the offenses of grand theft charged in Counts II and III of the information. The offenses were alleged to have been committed on or about October 1 and December 7, 1953. It is argued that the evidence as to these offenses consisted entirely of the testimony of Butterfield, an admitted accomplice. The evidence which tended to furnish corroboration of his testimony included receipts signed by him which have already been referred to and we hold it to be sufficient.

As previously mentioned appellants were charged in Count I with conspiracy to commit two crimes, namely, theft and falsification of public records. Although the evidence justified the verdict with respect to a conspiracy to commit theft it was insufficient, in our opinion, to establish a violation of or conspiracy to violate section 3020(b) of the Corporations Code. An affirmance of the judgment without mention of our views as to the insufficiency of the evidence to prove violation of that section would imply approval of a judgment based upon a verdict which we deem to be partly in error. Moreover, since we believe the conspiracy proved was one for the commission of a single crime and not two crimes it would seem that the appellants have a right to an expression of our views. Section 3020(b) reads as follows: "Every director, officer, agent, or shareholder of any corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the corporation, or makes or

concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation is guilty of public offense." The section deals with two subjects, first, the records of the corporation and second, with the matter of keeping accounts. In our opinion, "the books, papers, writings or securities belonging to the corporation" would embrace those held in ownership of some permanency, such as a corporation would be required to keep in order to maintain a true record of the condition of its affairs. All these would belong to the corporation. We think it is clear that it was not the intention to include as writings belonging to the corporation every writing of whatever nature issued by an agent of the corporation. If every such writing were deemed to be within the scope of the section there would be included writings made and issued to serve some temporary purpose and which would be destroyed after that purpose had been served.

American was given receipts by its customers for more drums than it delivered. Acceptance of such a receipt would not be a falsification of American's records. When American issued a receipt to a customer for fewer drums than the customer delivered, this would not be a falsification of American's records. Either transaction would merely furnish the basis for a charge against the customer. If the shortage was of drums delivered by American on a sale to a customer the latter would apparently owe American an excess of money; if drums were delivered to American in excess of the number receipted for the customer would owe American drums. None of these transactions involving shortages was completed at the time the transaction took place. They entered into the matter of accounting and were paid for in settlement

of accounts. It is altogether probable that the delivery memoranda were used as a basis for entries in American's books of account since some one in American's office force would have had that duty. But there was no evidence that Blau or Fisher ever made or caused to be made such entries. In the absence of evidence upon that score, we think the verdict and judgment in so far as they adjudged appellants guilty of violation of section 3020(b) of the Corporations Code were erroneous.

Error is assigned in the receipt of evidence of events occurring prior to April 13, 1953, the date of the formation of the conspiracy as alleged in the information. The testimony referred to is that of Butterfield, who related transactions in which he furnished drums to Blau in 1950 and 1951, during an earlier employment by Andrew Brown Company. Appellants moved to strike this testimony and the motion was denied. It is contended that the evidence was not relevant to the conspiracy charged in the information. The contention is untenable.

The general rule with respect to proof of a conspiracy is that it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before the alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate fact in issue. (People v. Stevens, 78 Cal. App. 395, 406; People v. Black, 45 Cal. App. 2d 87, 102.) It was proper to show the relationship of Butterfield and Blau and that they had engaged in the same type of dishonest practices before the formation of the conspiracy alleged in the information. In weighing the probabilities with respect to the existence of an un-

lawful agreement between them, it was proper for the jury to take into account evidence that they had previously engaged in similar practices which they found to be to their mutual advantage. Moreover, all the evidence with respect to the activities of Blau, Fisher, Mays and Meceirow in the transactions in evidence would have demonstrated that if Blau and Fisher were innocent, Mays and Meceirow alone were guilty of conspiring with the agents of American's customers. One contention seriously urged by appellants is that even if a conspiracy existed they had no part in it. But Mays was not employed by Blau in the handling of drums in 1950 and 1951 and for that additional reason evidence of Blau's earlier transactions with Butterfield was relevant.

Each appellant made motions to strike all evidence of statements and occurrences outside his presence, and the motions were denied. This was not error. It is elementary that after proof of a conspiracy evidence of the declarations of any of the conspirators and their acts within the scope of the conspiracy is admissible against all, including those who were not present at the occurrences. (People v. Cook, 10 Cal. App. 2d 54; People v. Correa, 44 Cal. App. 634; People v. Mazzurco, 49 Cal. App. 275.)

Appellants made motions to strike evidence as to searches made of the records of the various corporate customers and testimony that delivery slips in addition to those produced could not be found, and also to strike certain exhibits evidencing deliveries relating to the transactions in issue. The evidence was relevant to the issues and was properly admitted. It was not error to deny the motions.

A Mrs. Littke, a juror in the first trial in which, pursuant to stipulation, a mistrial was declared, testified on behalf of the People that while the former trial was under way she was patronizing the cafeteria of appellants; Fisher said in her hearing that he intended to take the jurors to dinner after the trial and Blau said he hopes the jurors would see it his way and that it would be to the jurors' advantage if they did. It is contended that this evidence was improperly received over objection and that the statement of the prosecutor in his opening statement that he intended to produce such evidence constituted misconduct. The claims of error and misconduct are unfounded. The statements, if made by appellants, tended to show a consciousness of guilt and under well-settled rules the evidence was admissible. Efforts of the defendant to suppress or fabricate evidence or to wrongfully influence or intimidate witnesses may be given in evidence as tending to prove a consciousness of guilt. (22 C. J. S., p. 966, sec. 633; Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414, 437; Silva v. Northern California Power Co., 32 Cal. App. 139, 146; Ross v. Railways Co., 47 Cal. App. 753, 767.). Attempts to influence jurors are in the same category.

The record shows that appellants had entered a purported but inadequate plea of former jeopardy. It was stated in the minutes "Each defendant enters an additional plea of 'Not Guilty having once been in jeopardy.'" During the course of the trial they sought leave to amend their plea so as to state the title of the court and cause, and the time and circumstances of a waiver of jury trial to which the amended plea would relate, and they relied upon a transcript of the proceedings of July 27, 1954 in support of their motion. Their motion to amend was

denied. The proceedings relied upon by appellants related to the proposed submission of the cause upon a transcript of the evidence at the preliminary. The reporter's transcript discloses that on July 27 in Department 44 before Judge Schweitzer it was stated by the court that the cause was to be tried in Department 42 (Judge Walker) and the court understood that the parties intended to submit it upon the preliminary transcript without further evidence. The attorneys stated that it would be so submitted, whereupon the court ordered the cause assigned to Department 42 on August 3 for further proceedings and the parties were ordered to appear at that time. Judge Walker could not try the case and it was re-transferred to Department 44, Judge Nye, for resetting. The People made a motion for vacation of the waiver of trial by jury and the tentative stipulation that the cause be submitted on the preliminary transcript. There was no objection by appellants and the motion of the People was granted. The cause was then assigned to Department 46, Judge Crum.

Where the trial is to a jury jeopardy attaches when the jury has been impaneled and sworn. (People v. Hawkins, 127 Cal. 372; In re Harron, 191 Cal. 457; People v. Young, 100 Cal. App. 18; Jackson v. Superior Court, 10 Cal. 2d 350.)

At the time of the waiver of jury trial when the court was told by counsel the cause would be submitted on the preliminary transcript, there was a further stipulation that each side reserved the right to move to strike any of the evidence. In seeking leave to amend their plea appellants offered a transcript of the proceedings which we have thus summarized. There was no showing that appellants had formerly been placed in jeopardy. The

proceedings on July 27 in the department of the presiding judge of the criminal departments were preliminary to the designation of a trial department. Appellants were not placed on trial in Department 44 either before Judge Schweitzer or Judge Nye, nor in Department 42 before Judge Walker. The cause was not submitted to any of those judges nor was a trial commenced in any manner at any time before the trial to a jury was commenced in the department of Judge Crum.

Where it is proposed that a cause will be submitted upon the evidence adduced at the preliminary without additional evidence, jeopardy does not attach prior to the commencement of the trial. This is all we are called upon to decide. Inasmuch as there was insufficient proof of former jeopardy as shown by the record offered in support of the motion to amend, there was no error in denying the motion.

It is contended that the court was required to render a decision upon the plea of former jeopardy and failed to do so. The plea of once in jeopardy must be oral, entered in the minutes and in substantially the following form: "The defendant pleads that he has been once in jeopardy for the offense charged" (specifying the time, place and court). (Pen. Code sec. 1017.) The purported plea was defective in that it failed to state the time, place and the court. In discussing the merits of the plea of former jeopardy, the court said: "Then, we come down to a point that up to this present time, as a matter of law, there is no plea of once in jeopardy before the court." We think this was a sufficient determination that the defense of former jeopardy as pleaded was insufficient as a matter of law. The plea was insufficient, and the ruling to that effect was all the decision the court was

required to make. The plea being insufficient in form and obviously unfounded upon the admitted facts, and the amendment having been properly denied, mere informality in the form of the court's ruling and the absence of an express finding would not be an irregularity which would justify a reversal and a retrial of the cause.

Several errors are assigned in the receipt and exclusion of evidence. These do not justify particular discussion. The testimony in question was inconsequential. We are satisfied that the rulings were neither erroneous nor in any respect prejudicial to the appellants.

A point is made of the fact that Forbes was permitted to testify as to the telephone conversations he overheard between Blau and Waymire and Goddard. It is said that his testimony was improperly admitted under the doctrine of People v. Cahan, 44 Cal. 2d 434. The point does not require discussion; appellants could have suffered no prejudice through the testimony of Forbes. The matters to which the conversations related, namely, the delivery of drums and the payment of money, were not in dispute since it was admitted by appellants that they did receive the drums and pay the money.

Appellants requested an instruction to the effect that if the evidence was susceptible of two equally reasonable constructions, the one favoring innocence of the defendants should be adopted. They say that no instruction was given "which in effect covered the same subject matter" and "since there was circumstantial evidence submitted to the jury the court should have instructed the jury which construction to adopt where the evidence was susceptible of different constructions." The People quote an instruction that the court gave, reading: "I instruct you further

that you are not permitted, on circumstantial evidence alone, to find a defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime but are irreconcilable with any other rational conclusion." This is a sufficient answer to the criticism of the court's failure to give appellants' requested instruction.

Appellants requested an instruction, which the court refused, to the effect that private transactions are presumed to be fair and regular (Code Civ. Proc. sec. 1963, subd. 19) and they assign the refusal as error. In view of the instructions that were given, including those as to the presumption of innocence we cannot see that the refused instruction would have aided appellants. Moreover, they had testified fully with respect to all the transactions in question. The court gave an instruction: ". . . Defendants are presumed to speak the truth; and unless this presumption is destroyed by the evidence in this case your oath requires you to find that they have spoken the truth." In view of the evidence this was a sufficient instruction. If the jury had believed the explanations of appellants the transactions in which they engaged would have been found to have been fair and regular.

There was no error in instructing to the effect that the testimony of Mrs. Littke was received for consideration only as it might tend to show a consciousness of guilt on the part of the defendants and that the significance of it, if any, was solely a matter for consideration of the jury. Neither was it error to instruct that testimony purporting to relate oral admissions of the defendants should be viewed with caution. While appellants did not make any admissions of guilt, there was

evidence of a great number of statements made to their accomplices which, if made, would have been even more potent evidence against them than mere admissions of guilt. Appellants were not harmed by the instruction and it may have been interpreted by the jury as favorable to them.

On their motion for a new trial appellants submitted an affidavit of one of the jurors in which she stated that the verdict was the result of a compromise; some of the jurors who were inclined to vote in favor of Mays' guilt voted for his acquittal when other jurors who were in favor of acquittal of the appellants agreed to vote in favor of the guilt of Blau and Fisher of a lesser offense. It was not error to refuse a new trial on the ground of misconduct of the jury. Jurors may not impeach their verdict by affidavit that it was the result of compromise, or for other irregularity other than that it was arrived at by chance. (People v. Kromphold, 172 Cal. 512; People v. Reid, 195 Cal. 249; People v. Gidney, 10 Cal. 2d 138; People v. DeVoe, 123 Cal. App. 233; People v. Richards, 1 Cal. App. 566; People v. Maggio, 90 Cal. App. 683; People v. Denton, 22 Cal. App. 2d 673.)

On their motion for new trial appellants presented the affidavit of one of their attorneys by which it was made to appear that appellants were charged with, tried and acquitted of conspiracy to violate section 182, subdivisions 1 and 5 of the Penal Code, based upon a charge that they had attempted to corruptly influence the juror, Mrs. Littke. It was alleged that the trial resulted in an acquittal after the conviction of the appellants in the instant case. The testimony of Mrs. Littke was introduced in the trial of appellants as tending to show a consciousness of

guilt on their part; their acquittal of an attempt to corruptly influence the juror meant only that they were not guilty of that offense, and upon a retrial would not have rendered inadmissible or incompetent the testimony of Mrs. Littke, and most assuredly did not require the court in the exercise of its discretion to grant a new trial. There was no abuse of discretion.

There are no other contentions of the appellants that merit particular discussion.

The judgment and order denying motion for new trial are reversed as to the convictions of petty theft and in other respects are affirmed.

SHINN, *P. J.*

WOOD, *J.*, and VALLÉE, *J.*, concurred.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent vs. Sidney Blau *et al.*, Defendants; Sidney Blau and Sidney Fisher, Appellants. Criminal No. 5371.

Filed March 27, 1956.

ORDER MODIFYING OPINION.

The Court: The opinion heretofore filed is modified by striking out the last paragraph and substituting therefor:

"The judgment and order denying motion for new trial are reversed insofar as appellants are adjudged guilty of conspiracy to violate section 3020(b) of the Corporations Code and in other respects are affirmed."

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent vs. Sidney Blau *et al.*, Defendants; Sidney Blau and Sidney Fisher, Appellants. Criminal No. 5371.

Filed March 28, 1956.

ORDER MODIFYING OPINION.

The Court: The opinion heretofore filed is modified by striking from the first paragraphs the words "and reversed"; also by striking out the last paragraph, as modified, and substituting the following:

Although, as we have stated, the charge of conspiracy in Count I of the information was broader than the conspiracy proved, this does not affect the validity of the conviction upon that count and it must be affirmed.

The judgment and order denying motion for new trial are affirmed.

Office - Supreme Court, U.S.
FILED
JUL 26 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 235

SIDNEY BLAU and SIDNEY FISHER,

Defendants and Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

and

THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE THEREOF,

Appellees.

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MEMORANDUM

OF

POINTS AND AUTHORITIES

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS

202 South Hamilton Drive
Beverly Hills, California
OLive 33126

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MURRAY M. CHOTINER, and
RUSSELL E. PARSONS

202 South Hamilton Drive
Beverly Hills, California
OLive 33126

Albert Jack Chotiner,
Of Counsel.

Attorneys for Defendants and Appellants

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Appellees.

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND ASSOCIATE JUSTICES:

Your petitioners, Sidney Blau and Sidney Fisher, respectfully desire to call the Court's attention to page 18 of the Petition for Certiorari, and a matter there labeled "McGrath Incident". We feel that we did not sufficiently cover this matter, and wish to call the Court's attention to some of the leading cases in California upon the subject of evidence of other offenses.

We direct the Court's attention to the case of People v. Lapin, 291 Pac. 2d 575, 580, 581, where the Court states the rule in California, quoting cases, to be as follows:

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> "It is a cardinal and universally recognized rule that in a ciminal prosecution an accused can be tried only for the offense which is charged against him in

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the indictment or information, and that evidence of collateral independent crimes is not admissible. The equally well recognized exceptions to this rule are clearly defined. 'Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme, 20 A. Jr., Sec. 310, et seq., p. 289 et seq.; 22 C. J. S., Criminal Law, Sec. 683 et seq., p. 1089, et seq.; Wigmore on Evidence, vol. II, ch. XIII, p. 191 et seq.; Wharton's Criminal Evidence, sec. 345 et seq., p. 487 et seq.; 8 Cal. Jr., sec. 168 et seq., p. 60, et seq.; 13 Cal. Jr., sec. 84 et seq., p. 703."

This decision also cites People v. Channell, 136 Cal. App. 2d ___, 288 P. 2d 326, where this subject was fully treated by the California courts. A petition for hearing in the Channell case before the Supreme Court of California was denied. It plainly states the law.

It is our contention that these rules, well established in California, were not applied by the District Court of Appeal, and the Supreme Court of California itself failed to invoke the rule when it denied the petition for hearing before it.

We respectfully call these matters to the Court's attention, for fear that we did not fully cover our position. It would indeed be a denial of due process of law if in one instance these cases were applied, but denied in another, as it was in

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We respectfully call these matters to the Court's attention, for fear that we did not fully cover our position. It would indeed be a denial of due process of law if in one instance these cases were applied, but denied in another, as it was in the instant proceeding.

Dated this 20th day of July, 1956.

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Respectfully submitted,

MURRAY M. CHOTINER and RUSSELL E. PARSONS

By Russell E Parsons
Russell E. Parsons
Attorneys for Defendants and Appellants
Sidney Blau and Sidney Fisher

ALBERT JACK CHOTINER,

Of Counsel.

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STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS.

Elizabeth DuShane, being first duly sworn on oath, deposes and says: That affiant is a citizen of the United States and a resident of the County of Los Angeles, California; that affiant is over the age of eighteen years, and is not a party to the within and above motion; that affiant's business address is 306 West Third Street, Los Angeles, California.

That on July 24, 1956, she served the within Memorandum of Points and Authorities on the Plaintiff and Appellees in said action or proceeding by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a mail chute regularly maintained by the Government of the United States at Los Angeles, California, addressed to the respective attorneys of record for said Plaintiff and Appellees at the office address of said attorneys, as follows:

Mr. Edmund G. Brown, Attorney General
State of California
State Building, Los Angeles 12, California

Mr. S. Ernest Roll, District Attorney
County of Los Angeles, State of California
Hall of Justice, Los Angeles, California

That there is delivery service by United States mail at the places so addressed.

Elizabeth DuShane

Elizabeth DuShane

Subscribed and sworn to before me
this 24th day of July, 1956.

Clifford H Clark

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Elizabeth DuShane

Elizabeth DuShane

Subscribed and sworn to before me
this 24th day of July, 1956.

Clifford H Clark

Notary Public in and for the
County of Los Angeles, State of
California

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MOTION FILED OCT 26 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 235.

FAIRMONT ALUMINUM COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING OUT OF TIME.

AND

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

MOTION.

Petitioner respectfully moves for leave to file, out of time, the annexed second petition for rehearing of the order of this Court (350 U. S. 838) entered October 10, 1955, denying the petition for certiorari and the order of this Court (350 U. S. 905) entered November 21, 1955, denying a petition for rehearing of the aforesaid order of October 10, 1955. This motion and the annexed petition are based on the following grounds:

1. Subsequent to the denial of the petition for certiorari and subsequent to the denial of the petition for rehearing as enumerated above, this Court has decided to review *United States* v. *Ohio Power Co.,* No. 312, October Term, 1955 by its order of June 11, 1956,* (351 U. S. 980) entered *sua sponte,* although this Court had (1) previously denied certiorari on October 17, 1955 (350 U. S. 862), (2) denied a first petition for rehearing on December 5, 1955 (350 U. S. 919), and (3) denied a second petition for rehearing on May 28, 1956 (350 U. S. 958). The instant case herein, like *United States* v. *Ohio Power Co.,* involves, in our opinion, a like question: the degree of literalism with which an Internal Revenue Statute will be enforced or non-statutory qualifications read into the statute by a process of administrative and judicial "interpretation". We submit that the action of this Court in determining to review the *Ohio Power Co.* case, after the remarkable history hereinbefore set forth, emphasizes the importance of this basic question, and hence constitutes supervening action of substantial and controlling effect which warrants this Court in reconsidering the denial of certiorari in the instant case herein and its prior order denying the first petition for rehearing thereof.

2. There is now pending on this Court's Docket, as No. 371, October Term, 1956, the case of *Lasky* v. *Commissioner* on petition for certiorari to the Ninth Circuit. As set forth in the petition annexed hereto, the Ninth Circuit has decided *Lasky* v. *Commissioner* in a manner contrary to the decision of the Fourth Circuit in the instant case herein and that such conflict in the Circuits, arising subsequent to the filing of the petition for certiorari herein and the denial of the

* "The order of December 5, 1955, denying the petition for rehearing is vacated and the petition for rehearing is continued."

prior petition for rehearing thereof constitutes substantial grounds and supervening action which warrants this Court's reconsidering its action in the instant case of October 10, and November 21, 1955.

Jurisdiction.

The jurisdiction of this Court to entertain the petition for certiorari filed during the preceding Term of this Court was not denied by the Respondent's brief in opposition thereto. The expiration of that Term "in no way affects the power of the Court to do any act or take any proceeding." *Judicial Code* §452.

Prayer for Relief.

Wherefore, Petitioner prays that this motion be granted, that the annexed petition for rehearing be granted and that on such rehearing that the order denying the petition for certiorari be vacated and such petition be granted and the judgment appealed from reversed, and for such other and further relief as this Court may deem just and proper.

Dated: New York, N. Y.,
October 24, 1956.

Earl Q. Kullman,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 235.

FAIRMONT ALUMINUM COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner prays that this Court grant a rehearing of its order of October 10, 1955 (350 U. S. 838), denying certiorari herein and its order of November 21, 1955 (350 U. S. 905) denying the first petition for rehearing and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the entitled cause as prayed for in the petition filed July 14, 1955.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT:

1. At the time this Court's orders were entered as set forth in the preceding paragraph, the conflict in the Circuits was not as apparent as is now revealed by cases now before this Court for argument and by cases pending on this

Court's docket. The Respondent's opposition to granting of certiorari herein significantly omitted any contention that there was no conflict in the Circuits and inferentially at least admitted such conflict.

The importance of the questions presented by this petition are now more sharply underlined by the pendency on this Court's Calendar of the following cases:

United States v. *Allen-Bradley Co.*, No. 78, this term;

National Lead Company v. *Commissioner*, No. 124, this term;

United States v. *Ohio Power Co.*, No. 312, last term, order denying rehearing vacated and case continued by order of June 11, 1956 (351 U. S. 980).

The above cases involve the question of whether an Internal Revenue Statute (the provision for accelerated amortization of National Defense facilities) should be literally enforced as Congress has written it. The Government is contending that a non-statutory modification *can* be read into the statute by administrative and judicial interpretation. The Circuits and the Court of Claims are in conflict.

2. There is now pending on this Court's Docket as No. 371, *Lasky* v. *Commissioner*, petition for certiorari to the Ninth Circuit to review a dismissal of an appeal on jurisdictional grounds and its refusal to review the merits. That case involves the question whether an Internal Revenue Statute (the provision for determining the date when a Tax Court decision achieves finality) *must* be read with a literalism which denies a judicial review. Other courts, like the

Fourth Circuit in the instant case herein have refused to apply a like degree of literalism to other and comparable Internal Revenue Statutes.

3. In the instant case herein, we contended that 1939 Internal Revenue Code §276(g), requires the Tax Court to enforce the plain mandate of the Internal Revenue Laws and review the merits of the tax controversy presented by petitioner in the pleadings below. The Tax Court herein and the Fourth Circuit have read into the statute, by a process of administrative and judicial legislation, a non-statutory qualification (collateral estoppel by reason of a prior non-suit for failure of proof), *a subject on which Congress has never legislated.*

4. The question common to all of the cases hereinbefore referred to, including the instant case herein, is the degree of literalism to be accorded to the Internal Revenue Laws. The variant results reached in the Circuits indicate irreconcilable conflict and a pressing need for clarification by this Court.

5. The Fourth Circuit in the instant case reads a broad type of judicially developed *common law* collateral estoppel into the Internal Revenue Laws because the Tax Court is *"like"* a judicial court. The Ninth Circuit in *Lasky* v. *Commissioner,* No. 371, this term, *refuses* to read into the Internal Revenue Laws, the judicially developed *common law* doctrine of *coram nobis* and relief from excusable oversight because the Tax Court is *not "like"* a judicial court; it is, says the Ninth Circuit, an administrative agency strictly limited to its statutory powers. A like doctrine, if applied by the Fourth Circuit in the instant case herein, would have required a contrary result.

6. The doctrine of collateral estoppel by administrative action, the principal point involved in the instant case herein is also involved in the *Allen-Bradley Company* case, No. 78, *supra,* and the *National Lead Company* case, No. 124, *supra,* as the Government's reply brief in No. 78, pages 2-3, clearly shows:

> "Furthermore, the conflict between the decisions of the two courts (which was expressly recognized by the Court of Claims in its opinion in this case) arises from the fact that the Second Circuit refuses to permit a collateral attack, in the tax proceeding, on the administrative decision in certifying only part of the cost of the facilities, while the Court of Claims does precisely the contrary."

The decision of the Court of Claims in the *Allen-Bradley Company* case is, therefore, in direct and irreconcilable conflict with the decision of the Fourth Circuit in the instant case herein; while the decision of the Second Circuit in the *National Lead Company* case is directly contrary, without citation, of its prior decision in *Rosenblum* v. *Federal Trade Commission,* 214 F. 2d, 338 vacating a prior judgment entered after adversary proceedings, 192 F. 2d, 392 and after this Court had denied certiorari in the latter action, 343 U. S. 905. The *Rosenblum* case is cited, discussed and quoted at length at pages 14-15 of our petition for certiorari herein.

We submit this is the type of irreconcilable and embarrassing conflict which warrants the intervention of this Court herein.

7. The foregoing is limited to the cases which have supervened since the denial of the first petition for rehearing herein. The continuing of the petition for rehearing in

the *Ohio Power Company* case, *supra,* after twice denying rehearing and after denial of certiorari, indicates a pressing problem for solution of the basic question of interpretation of Internal Revenue Statutes.

It is submitted that we have shown substantial grounds for reconsideration by this Court of its prior action in denying review herein.

Conclusion.

The petition for rehearing should be granted, the denial of certiorari vacated and the petition for certiorari granted.

Respectfully submitted,

Earl Q. Kullman,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

EARL Q. KULLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

CERTIFICATE OF SERVICE.

I hereby certify that the foregoing petition and motion were served upon the Solicitor General by depositing copies thereof in a first class postpaid wrapper addressed to him at his office.

EARL Q. KULLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.